STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS - LOS ANGELES, Charging Party,	)	Case No. LA-CE-3227
v.	)	PERB Decision No. 1041
LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	March 17, 1994

Appearances: Taylor, Roth, Bush & Geffner by Leo Geffner, Attorney, for United Teachers - Los Angeles; O'Melveny & Myers by Steven M. Cooper, Attorney, for Los Angeles Unified School District.

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the United Teachers - Los Angeles (UTLA) to an administrative law judge's (ALJ) denial of an amendment to a complaint and the subsequent dismissal of the complaint (attached). UTLA argued that the reduction by the Los Angeles Unified School District (District) of the 1992-93 bilingual teacher differentials was contained within its initial unfair practice charge and therefore was a timely amendment. The ALJ determined that the subject of the amendment was not included in any of the various unfair practice charges filed by UTLA nor was any evidence introduced during UTLA's case in chief. The amendment was then found to be untimely, as it was based upon an unfair practice occurring more than six months prior to the

filing of the charge in accordance with section 3541.5(a)(1) of the Educational Employment Relations Act (EERA).[1]

The Board has reviewed the ALJ's dismissal of UTLA's proposed amendment and dismissal of the complaint, UTLA's appeal and the District's response thereto and the entire record in this case. The Board finds the ALJ's denial of the amendment and dismissal of the complaint to be free of prejudicial error and therefore adopts it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-3227 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair joined in this Decision.

Member Garcia's dissent begins on page 3.

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[1]**EERA** is codified at Government Code section 3540 et seq. Section 3541.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

Garcia, Member, dissenting: I would reverse the Public Employment Relations Board (PERB or Board) denial of the proposed amendment (dismissal) and remand the case back to the ALJ for issuance of a complaint regarding the bilingual differentials. My reasons for this follow.

DISCUSSION

Effect of Settlement Language

The dismissal devotes much attention to a "relation back" doctrine to determine whether United Teachers - Los Angles (UTLA) timely filed its charge and places insufficient emphasis on the parties' settlement.[1] On May 25, 1993, the parties executed a settlement document containing this key language:

> Both parties shall withdraw/dismiss all 1992-93 negotiations-related litigation, or claims, whether asserted or unasserted, including . . . PERB charges. except for UTLA's PERB complaint regarding coordination of benefits under the health plan and the dispute over bilingual salary differential reduction. [Agreement, Art. II, sec. 1.0.]

The Los Angeles Unified School District (District) argues that the effect of the language is to expressly acknowledge that the bilingual differential was not part of the pending PERB action. UTLA, on the other hand, argues that all the words after "PERB complaint regarding" refer to the complaint, which includes two unresolved issues: (1) coordination of benefits under the

[1]At page 5 of the dismissal, the ALJ concisely mentions that "The settlement negotiations ultimately were successful and an agreement was reached between the parties."

health plan; and (2) the dispute over bilingual salary differential reduction.

Under contract interpretation principles, a contract may be explained by reference to the circumstances under which it was made. (Witkin, Summary of Calif. Law, Contracts (9th ed. 1987) sec. 688, p. 621.) Given the evidence in the file, I find that the intent of the underlined language conforms to the interpretation advanced by UTLA. If the parties had intended to separate the topic of dispute over bilingual salary differential reduction, they could have done so by recasting the language to more clearly delineate the two categories, for example by placing a comma before the second clause (after the word "plan"). As written, the "PERB complaint" includes both issues and the parties agreed to reserve UTLA's right to have PERB adjudicate the health and differentials issues. To escape PERB jurisdiction, the District contradicts the inclusive language it agreed to and makes the strained argument that the sentence incorporates two subjects (a PERB complaint dealing with health benefits, and a bilingual salary differential reduction) rather than one (the PERB complaint). It is unlikely that, after protracted negotiations, the parties would not have a common understanding of the settlement language referring to the PERB complaint.

Based on the Documents in the File, the First Amended Charge May be Read as Including the Concept of Differentials in the Term "Salary"

There is evidence to support a conclusion that both parties intended that the term "salary" included differentials, an interpretation that dated from the early stages of their negotiations. For example, in a memo to the Board of Education dated May 18, 1992 regarding budget proposals, the District used the following language:

> . . . the District proposes careful discussion and review of the following matters for possible adjustment, reduction or curtailment:
>
> b. All salary schedules and rates, including differentials.
> (UTLA Exh. 3, p. 2; emphasis added.)

A few months later, in its Final 1992-93 Economic Offer, implemented October 2, 1992, the District described its offer as covering:

> . . . all salary schedules and rates, including those which are not calculated as a percentage of regular base salary, such as differentials, professional expert rates, substitute rates, temporary personnel rates, etc.
>
> (UTLA Exh. 16; emphasis added.)

UTLA filed its first amended charge within weeks of the District's implementing the final offer just quoted. Presumably that offer was still fresh in the minds of both parties, a factor which lends credibility to the conclusion that UTLA was using the term "salary" as the District had defined it in its recent offer.

Based on those documents, I find that UTLA pled the issue of differentials specifically enough in its first amended charge to

put the District on notice of the topic. Furthermore, PERB precedent has not required technical precision in pleading requirements and encourages concise statements in pleading.[2]

As phrased, the first amended charge put the District on notice that the general topic of wages was at issue.[3] Thus, the concept of differentials was included in the charge when written and the Board should not be sidetracked into considering whether a later amendment "relates back" and would be timely.

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[2]See Moreno Valley Unified School Dist, v. Public Employment Relations Bd. (1983) 142 Cal.App.3d 191, 202-203, citing National Labor Relations Board precedent:

> Actions before the [NLRB] are not subject to the technical pleading requirements that govern private lawsuits. [Citation.] The charge need not be technically precise as long as it generally informs the party charged of the nature of the alleged violations. [Citations.]

Similarly, PERB Regulation 32615(a)(5) only requires that the charge contain "[a] clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB regulations are codified at Cal. Code of Regs., tit. 8, sec. 31001 et seq.) UTLA's charge clearly and concisely referenced the District's unilateral implementation of its offer as the conduct giving rise to the alleged unfair practice.

[3]We also note that in Moreno Valley Educators Association v. Moreno Valley Unified School District (1982) PERB Decision No. 206, extra duty stipends for teachers who did sports supervision, special education, journalism, yearbook, drama, reading, vocal music and band were considered as part of the concept of wages. The differentials at issue in the present case are similar to the concept of extra duty stipends in Moreno Valley, a teacher earns extra money for performing an additional function. Admittedly, the issue in Moreno Valley was different (whether certain topics were within the scope of bargaining or not), but the analogy is relevant because in both cases, we must identify what parties intended a particular term (wages) to encompass.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS--LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-3227

NOTICE OF DENIAL OF PROPOSED AMENDMENT AND DISMISSAL OF COMPLAINT

NOTICE is given that the proposed amendment to complaint and request of Charging Party for further proceedings in the above case are hereby denied. Notice also is given that the remaining portions of the charge and complaint are hereby **DISMISSED.** The proposed amendment is denied because it would add new matter regarding events that occurred outside the statutory period for timeliness. The charge and complaint are dismissed because without the amendment, there is no remaining issue in dispute, all other matters having been withdrawn by the Charging Party.

This case grows out of protracted negotiations during 1992 and 1993 between the United Teachers--Los Angeles (Union or UTLA) and the Los Angeles Unified School District (District). The Union filed the original charge against the District on August 19, 1992. The charge accused the District of engaging in surface bargaining, of refusing to respond to the Union's request for information relevant and necessary to bargaining and of unilaterally implementing changes in the health plan.

On October 28, 1992, the Union filed a first amended charge which supplemented and clarified the original charge and added new allegations including the following contention:

> On or about October 2, 1992, prior to reaching a bona fide impasse in negotiations and without exhausting all reasonable efforts to achieve a negotiated agreement, the District unilaterally implemented salary and benefit reductions, including (a) a salary cut of 12 percent from the salaries in effect on July 1, 1992, (b) increases in co-payments and deductibles in medical plans, and (c) complete elimination of a Blue Shield indemnity medical plan that has been available to employees.

The first amended charge also accused the District of eliminating the "coordination of benefits" provisions of the health plan without first negotiating this issue with the Union.

The Union filed a second amended charge on October 30, 1992, which added an additional allegation regarding the District's failure to reply to the Union's request for bargaining information.

On November 2, 1992, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the District. The complaint alleged that the District had violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act.[1] In summary, the 23-paragraph

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is found at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to do any of the following:

complaint alleged that the District:

1) Had failed and refused to respond to six specific items of information requested by the Union as relevant and necessary for bargaining;

2) On or about October 2, 1992, had cut salaries by 12 percent, increased co-payments and deductibles in medical plans, and eliminated a Blue Shield indemnity medical plan;

3) On or about October 15, 1992, had eliminated the "coordination of benefits" provision from the District health plan.

On December 15, 1992, the Union filed a third amended charge which alleged new information in support of its earlier contention that the District had engaged in surface bargaining. This amended charge also alleged that the District had entered into "me too" and so called "equitable treatment clauses" with six other bargaining units which had the effect of restricting the District's ability to reach agreements with the Union.

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

On December 22, 1992, the general counsel of the PERB issued a first amended complaint. To the prior complaint, this amendment added an allegation that the District had entered "me too" agreements with exclusive representatives in six other bargaining units. These agreements, the complaint alleged, had hindered negotiations between the Union and the District.

Meanwhile, the District filed a countering unfair practice charge against the Union alleging failure to negotiate in good faith and surface bargaining.[2] On December 18, 1992, the general counsel issued a complaint against the Union alleging a violation of section 3543.6(c).[3]

The countering complaints were consolidated for a hearing, which commenced on January 19, 1993, in Los Angeles.[4] There

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[2]This was unfair practice charge LA-CO-604.

[3]EERA section 3543.6 in relevant part provides as follows:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

[4]On the first day of hearing, the complaint against the District was amended to add an allegation that the District's actions also violated section 3543.5(e). That section provides:

> It shall be unlawful for a public school employer to do any of the following:
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> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9

followed nine non-consecutive days of hearing. The Union called two witnesses who testified over the two and a half days during which the Union presented its case in chief.[5] The hearing was recessed in March while the parties pursued further settlement negotiations. By the time the hearing was suspended, the Union had introduced 40 exhibits. The settlement negotiations ultimately were successful and an agreement was reached between the parties.

On August 30, 1993, the Union filed with the PERB a document entitled "Request for Dismissal of Portions of Complaint and Unfair Practice Charges; Request for Further Proceedings." That document in its entirety reads as follows:

> Charging Party, United Teachers--Los Angeles hereby requests dismissal of the Complaint, as amended, and underlying unfair practices in this proceeding, except as set forth below:
>
> Paragraph 14 of the Amended Complaint in this matter provides in part, as follows:
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> On or about October 2, 1992, Respondent changed policy by deciding to do the following:
>
> a. Cut salaries by twelve percent;
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> Charging Party wishes to proceed solely with this portion of the Amended Complaint insofar as it relates to the District's unilateral implementation of a 12 percent reduction in the salary differential paid to

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(commencing with Section 3548).

[3]The Union rested its case on January 21, 1993. (Reporter's Transcript, Vol. III, p. 99.)

> UTLA represented employees in the District's bilingual education program.
>
> Charging Party respectfully requests that this portion of the Complaint be set for further proceedings at the Board's earliest convenience.

On August 30, the undersigned sent to the parties a proposed amendment to the complaint to reflect the Union's partial withdrawal and revised allegation. However, the District on September 1, filed objections to the Union's proposed amendment. The District challenged the Union's assertion that the reduction in the differential paid to bilingual teachers was ever a part of the unfair practice case. "At no time," the District asserted, "was this issue the subject of an unfair practice charge filed by UTLA, investigated by the Board, or part of any Complaint filed by the Board." Rather, the District asserted, the Union was simply attempting to file a new unfair practice charge. Separately, the District withdrew its unfair practice charge against the Union and asked that it be dismissed.

On September 15, the District filed an objection to the proposed second amended complaint. The District restated its contention that the reduction of the differential paid to bilingual teachers was never a part of any earlier charge filed by the Union. The District asserted, further, that the allegations stated by the Union were time-barred since they were not raised in the earlier charge, complaint or at any time during the nine days of hearing. The District wrote:

> In fact, despite having ample opportunity to raise this issue both prior to and at the

> hearing . . . , UTLA presented no evidence, testamentary or documentary, concerning reductions by the District in the bilingual pay differential to teachers for 1992-93. Clearly, UTLA never considered this issue part of its charge. Similarly, the Board never considered this issue part of its Complaints. The Board never inquired into the District's negotiations with respect to bilingual teaching differentials or investigated UTLA's instant allegation. Further, neither of the Board's complaints in this action ever mentioned the negotiations regarding bilingual teaching differentials.

Under section 3541.5(a)(1), the PERB is precluded from issuing "a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." However, an exception "may be made where an amended charge is found to 'relate back' to the original charge." (See Temple City Unified School District (1989) PERB Order No. Ad-190 and cases cited therein.)

The relation back exception allows the charging party to amend a charge, after the period of limitations, to add a new legal theory to,, challenge the events already alleged. (Gonzales Union High School District (1984) PERB Decision No. 410.) But this exception will not allow an amendment that relies on factual allegations not set out in the original charge. (Burbank Unified School District (1986) PERB Decision No. 589.)

The Union's request to proceed with the hearing on a 12-percent cut in salary differential for bilingual teachers is in substance, although not in form, an amendment. There is no mention in any of the Union's earlier charges of a cut in the differential paid to unit members in the bilingual education

program. Nor is there a mention of a reduction in the differential in the original or first amended complaint. The amendment is thus timely only if the reduction in salary differentials can be considered to have been included within the allegation of a 12 percent salary reduction.

While a salary and a differential are both forms of compensation, the term "differential" is not ordinarily included within the term "salary." A differential is a form of compensation earned in addition to and apart from an employee's salary. Differentials typically are provided to employees who perform some extra duty or have some special skill in addition to what is required for the base salary. Differentials typically are negotiated separately from the base salary and do not necessarily have a fixed relationship with the base salary. Indeed, the bilingual differential at issue here is not even contained in the salary section of the 1988-91 agreement between the parties.[6] Thus, the Union's allegation that salaries were reduced by 12 percent does not include within it an allegation that differentials were reduced by 12 percent.

The Union, in a response to the District's position here, argues that the District's final 1992-93 offer by its own terms included cuts in the salary differential.[7] It was this offer

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[6]The bilingual education differentials are described in Article XI-B, section 3.0, of the agreement between the parties. The salary provisions are set out in section XIV. (See District Exhibit no. 33.)

[7]Union Exhibit no. 17.

that was unilaterally implemented by the District on October 2, 1992. The Union contends that in its unfair practice charges it challenged the unilateral implementation of the salary reduction, in all its parts, including the cut in the bilingual differential. There is no basis, the Union contends, for an assertion that the reduction of the salary differentials was a separate transaction or occurrence which was treated separately. The Union contends that had it prevailed on the original complaint any remedy necessarily would have included restoration of the reduction in salary differentials.

While it is clear that the District did reduce salary differentials in its October 2, 1992, resolution, this reduction is nowhere mentioned in any of the various unfair practice charges filed by the Union. Nor did the Union present any evidence about the reduction of differentials in its case in chief during the nine days of hearing that already have been completed. If, as the Union maintains, reduction of the bilingual differentials was necessarily included within its charges one would expect that the Union would have introduced evidence about the issue during the portion of the hearing already completed.

Yet, in its response here, the Union asserted that the PERB should,

> . . . reopen the proceedings and commence a full-blown, essentially separate, hearing on the narrow issue set forth in the proposed amended complaint, with the UTLA putting on its case-in-chief at the outset.

The very fact that the Union would request that it be allowed to reopen its case in chief and present evidence about the bilingual differentials amounts to a concession that the issue is new. If the question had been part of the original charge and complaint, the Union already would have presented all necessary evidence on the question. It would be unnecessary to "commence a full-blown, essentially separate hearing" on the issue of reduction of bilingual education differentials.

Nor is the Union correct in its assertion that had it prevailed on the original charge, the remedy necessarily would have included restoration of the differentials. In the absence of an allegation about the bilingual differentials in the charge or complaint and in the absence of evidence about them in the record, there would have been no basis for a remedy to even consider the subject.

Accordingly, I conclude that the proposed amendment of the charge and complaint and the Union's request to contest the reduction of bilingual teaching differentials must be denied as untimely. All other matters having been withdrawn by the Union, no further proceedings are necessary because there remains no issue to litigate. Therefore, the remaining portion of unfair practice charge LA-CE-3227, United Teachers - - Los Angeles v. Los Angeles Unified School District, and its accompanying complaint are hereby DISMISSED.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, the Charging Party may obtain a review of this refusal to amend complaint and dismissal of the charge and complaint by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If the Charging Party files a timely appeal of the refusal to amend the complaint and dismissal, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs.,

tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

RONALD E. BLUBAUGH
Administrative Law Judge

October 5, 1993